No. 15,629.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

LOUISE L. COBIN,
Appellant,

vs.

MIDLAND MUTUAL LIFE INSURANCE COMPANY,
a Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF.

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I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, entered on April 11, 1957 (C. T. 31-32).*

*For the convenience of the Court, references to the Transcript prepared by the Clerk will be designated "C. T." References to the Reporter's transcript will be designated by the letter "R".

The first amended complaint alleges that appellant is a citizen of the State of California, and that appellee is a citizen of the State of Ohio, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 (C. T. 23). The Court found in accord with that allegation (C. T. 27).

The jurisdiction of the District Court was based upon Section 1332 of Title 28, United States Code. The jurisdiction of this Court is based upon Section 1291 of Title 28 of the United States Code.

II.

PROCEEDINGS BEFORE TRIAL.

1. Statement of the Pleadings.

On January 3, 1956, appellant filed a complaint to recover as beneficiary under a life insurance policy issued on the life of her deceased husband, Leo Cobin (C. T. 1-4). Appellant alleged that the said policy had been delivered to defendants' agent, Chester Bloome, and that appellant's husband had accepted said policy (C. T. 2).

Appellee's answer denied liability on the ground that said policy was never accepted by Mr. Cobin and no delivery thereof to him was ever accomplished (C. T. 5-8).

On December 18, 1956, appellant noticed a motion for leave to file a first amended complaint (C. T. 8). Concurrently therewith, appellant lodged with the Clerk of the Court her proposed amended complaint (C. T. 10-12). Paragraph IV of the amended pleading as proposed alleged

that the insurance policy issued by appellee was delivered to Mr. Cobin in February, 1954 (C. T. 11).

Said motion was heard on January 7, 1957 (R. 1a-13a). By supporting affidavit and upon argument of said motion, appellant's counsel advised the Court that at the taking of the deposition of appellee's agent, Bloome, it had been ascertained that the policy was delivered personally by Bloome to Cobin (R. 2a-3a).

Appellee resisted appellant's motion and objected to the filing of the amended complaint unless appellant added an allegation that the policy on Mr. Cobin's life had been re-delivered by Cobin to Bloome (R. 4a-7a). Over appellant's objection, the Trial Court suggested to appellant's counsel that the Court would deny the motion so that counsel could comply with appellee's views (R. 7a). Appellant's counsel pointed out that the burden did not lie with appellant to make such allegation, on the ground that redelivery of the policy to the insurer was a matter of defensive pleading (R. 8a-9a). Notwithstanding this, the Trial Court refused to permit the amended pleading as lodged with the Court to be filed unless appellee's proposed changes were incorporated into appellant's pleading (R. 8-17a). The Court thereupon denied appellant's motion (C. T. 13).

On February 18, 1957, the Court granted appellant leave to file a first amended complaint (C. T. 21), appellant having revised her complaint to conform to the objections raised by appellee and sustained by the Court (C. T. 18-20). Thereafter appellee filed its answer to the first amended complaint (C. T. 23).

2. The Interrogatories.

On February 18, 1957, appellee filed notice of the taking of deposition on written interrogatories of Fred E. Stewart and Harold J. Fogg (C. T. 15-16h). Appellant filed notice to strike certain of the proposed interrogatories and to limit the scope of examination (C. T. 17-17t). On February 17, the Court overruled appellant's objections (C. T. 21).

During the trial, the above depositions upon written interrogatories were introduced in evidence despite proper objection as to the admissibility of that evidence (R. 318 *et seq.*; R. 340 *et seq.*). The prejudicial character of the Court's erroneous rulings in that regard will be discussed in the subsequent argument.

III.

STATEMENT OF THE CASE.

1. Prefatory Statement.

Detailed statements of fact which are pertinent to the several arguments made below will be given under their separate headings to facilitate reference. This is especially true with regard to numerous rulings of the Court on the subject of its erroneous receipt of a plethora of inadmissible testimony, which reflects such fundamental disregard of established rules of evidence as to constitute prejudicial error and makes a reversal of the decision mandatory to obviate a miscarriage of justice. The following outline of the case is, therefore, a general statement giving the background of the controversy and significant evidence.

2. Facts.

In 1953 and 1954, one Chester Bloome was employed as a life insurance agent by Midland Mutual Life Insurance Company, the appellee herein (R. 84). Bloome worked as a solicitor of life insurance out of the office of the Van Elgort Agency in Beverly Hills, California (R. 85). Van Elgort was the general agent for appellee, Midland Mutual Life Insurance Company (R. 276).

In April or May, 1953, Bloome approached appellant's late husband, Leo Cobin, for the purpose of selling him some life insurance (R. 86). After having the policies already in existence on Mr. Cobin's life analyzed (R. 87), Bloome suggested that appellant and her husband, Mr. Cobin, each apply for a policy of life insurance in the amount of $25,000.00 (R. 90).

In compliance with Bloome's recommendation, Mr. and Mrs. Cobin proceeded to make separate applications to appellee for life insurance in the amount of $25,000.00 each (R. 91-92). Bloome called at the home of Mr. and Mrs. Cobin with the insurance applications, and both Mr. and Mrs. Cobin completed Part I for a policy of insurance designated as Preferred Life to 85 in the face amount of $25,000.00 on December 15, 1953 (R. 91-92; Pl. Ex. 1; Pl. Ex. 3).

Bloome knew that various other life insurance companies had issued policies to Mr. Cobin with sub-standard ratings, and that in the period immediately preceding his application he had asked certain of those companies to improve his rating to sub-standard A and that he had gotten that rating (R. 129-130). Bloome told Mr. Cobin he was sure appellee would give him a comparable rating (R. 41).

In this connection, Bloome incorporated into paragraph 11 of Part I of Mr. Cobin's application the following statement:

> "Present rating of most recent insurance policies sub-standard A" (Pl. Ex. 1).

After the separate applications for life insurance in the amount of $25,000.00 were signed by Mr. and Mrs. Cobin, Bloome was given a check for $130.00 to pay the combined cost of the first month's premiums (R. 42; Pl. Ex. 4). This check covered a monthly premium cost of $57.50 for appellant (R. 207) and a monthly premium of $69.52 for Mr. Cobin on the basis of a sub-standard rate (R. 220-221). The balance of the check represented a premium overpayment (R. 199; R. 214). Had Mr. Cobin applied for a standard rate policy as distinguished from a sub-standard rate, the premium on a monthly basis would have been $59.50 rather than the amount charged (R. 221). In point of fact, the $69.52 charged as the first month's premium for Mr. Cobin was an overcharge by $3.52 because of a miscalculation of Bloome (Pl. Ex. 1, agent's certificate, par. 19) or by Van Elgort's cashier (R. 312). As appears from the face of the policy as issued, the monthly premium to be paid was $66.00 (Pl. Ex. 5).

Appellant testified she received no deposit slip at the time of payment by check (R. 44-45). Bloome testified he issued separate receipts for $57.50 for appellant and $72.50 for Mr. Cobin, although the latter's premium payment was calculated only at $69.52 (R. 217). Bloome testified that the figure of $69.52 which appears in paragraph 20 of part one of the application form signed by Mr. Cobin was not

inserted at the time the application was signed, but was entered thereon by a cashier in his office subsequently (R. 213-214; R. 259; Pl. Ex. 1).

Bloome delivered appellant's premium check for $130.00 to the Van Elgort Agency, together with the signed applications (R. 100). The premium was held by Van Elgort in his trust account as appellee's general agent until the issued policies were delivered to him in February by appellee (R. 293-294). Thereupon, Van Elgort remitted the premiums from his trust account to appellee's Home Office (R. 294).

On February 11, 1954, appellee issued to both Mr. and Mrs. Cobin a policy of life insurance in the face amount of $25,000.00 on each of their lives (R. 384; Pl. Exs. 5 and 6). Van Elgort received from appellee the two policies of life insurance for $25,000.00 issued to appellant and her husband on February 12, 1954, and they were picked up by Bloome on February 15, 1954 (R. 294). As appears from plaintiff's Exhibit 1, appellee's Home Office inserted the words "insurance issued special class A" in paragraph 19 of Mr. Cobin's application form (R. 112; Pl. Ex. 1), the precise rating applied for by Mr. Cobin, Special Class A being the same as substandard A indicated in Paragraph 11 of Part I of Mr. Cobin's application (R. 136; Pl. Ex. 1). The substandard A or Special Class A rating both rank next to the standard rating in the scheme of insurance ratings (R. 137).

That the policy was issued as applied for clearly appears from the letter of February 11, 1954, from H. E. Brown, appellee's underwriter, to Fred Stewart, one of ap-

pellee's officials, which states, in part: "We have been able to complete these applications, *and they have been approved today* * * *" (Pl. Ex. 9).

On February 17, 1954, Bloome delivered the two policies issued by appellee on the life of Mr. and Mrs. Cobin to Mr. Cobin (R. 110; Pl. Exs. 5 and 6). The policies were enclosed in black leather portfolios embossed with the names of appellant and her deceased husband (Pl. Exs. 7 and 8; R. 18-19).

Although Bloome testified that Mr. Cobin informed him that he could not accept the policies until he decided whether he wanted the insurance, Bloome nevertheless left the policies with Mr. Cobin (R. 110). Bloome testified that on February 19, 1954, he visited Mr. Cobin and was advised by him that Mr. Cobin was not going to take the policies (R. 114). Bloome testified that Mr. Cobin returned the policies and the Deposit receipts to him and requested the return of the check (R. 114).

Appellant testified that when Bloome delivered the policies to Mr. Cobin at their home, Mr. Cobin advised Bloome that he appreciated getting the policy that he had applied for and that he would get in touch with Mr. Bloome with respect to additional insurance (R. 56). She testified that several days later Bloome visited their home in respect to a call from Mr. Cobin (R. 57). She testified as follows to the conversation that took place between her husband and Mr. Bloome:

> "My husband told Mr. Bloome that he had decided to make a change or two, that in thinking over his purchase with him, that he had decided that a much wiser

purchase would be a $50,000 policy on himself and that he wanted him to cancel my policy; that he would like, if possible, $25,000 additional insurance added to his original $25,000 that he had. He asked him if it would be possible to date that, the second $25,000 on his life back to the date of the original $25,000 that had been issued in January.

"He told Mr. Bloome that he felt that it would be safer coverage, much better protection for myself and for the children in doing that, that in the event of my death that while it would be a serious family loss, it would not be a financial loss, and in case of his death, there would be both, both the personal and a very serious financial loss." (R. 58).

Bloome stated he would see if he could arrange this through his office and he picked up the policies (R. 58 and 59).

Mr. Cobin died on March 5, 1954 (R. 10; R. 121). At the time of his death, appellee continued to retain the premiums which had been paid for the insurance and made no offer to render back such premium until March 30, 1954, twenty-five (25) days after Mr. Cobin's death (Pl. Ex. 11) and did not return the premiums until April 16, 1954 (Pl. Ex. 12). In the letter of March 30, 1954, Mr. Van Elgort wrote to appellant that the policies were returned for cancellation (Pl. Ex. 11).

However, on March 9, 1954, four days after Mr. Cobin's death, appellee sent Mr. Cobin a notice informing him that the next premium of $66.00 was due on March 24, 1954 (R. 24-25; Pl. Ex. 10).

Van Elgort testified that he sent the Cobin policies back to appellee's Home Office (R. 277). Over objections on the ground that it constituted inadmissible hearsay, appellee was permitted to introduce a letter dated February 22, 1954, from Van Elgort to appellee's Home Office asking for a return of the premium and Bloome's commission on the sale (R. 278; Def. Ex. "I"). Again over objection, the deposition upon written interrogatories of appellee's employee, Fred Stewart, was introduced in evidence, in which he testified that in processing Mr. Cobin's policy at appellee's Home Office he stamped on "Not Taken March 3, 1954" on that date (R. 324; R. 326). However, there was introduced in evidence a photostatic copy of appellee's policy record card, on the backside of which there is recorded the following information with respect to termination of the policy: "Lapsed, March 10, 1954" (Def. Ex. M; R. 360). It is important to observe that Exhibit M contains the further notation "Redelivered for Cancellation", and the words "Not Taken March 3, 1954", *are stricken* and on the left hand side appears the legend "Lapsed March 10, 1954". Also, printed thereon, appear the words "TERMINATION MARCH 10, 1954". The significance of these items will be developed in a subsequent part of this brief.

Appellant never accepted appellee's belated offer to return the premium and filed with appellee a demand for payment under Mr. Cobin's policy on August 25, 1954 (Pl. Ex. 13). That demand was rejected by appellee (R. 28).

3. Summary of Findings.

In its Findings of Fact, the District Court found as follows:

(1) That Mr. Cobin applied for a Preferred Paid Up Life at age 85 policy of insurance in the face amount of $25,000, to be issued at standard premium rates (C. T. 28).

(2) That the payment of $130.00 made at the time of the execution of the application for life insurance by Mr. and Mrs. Cobin was not given in payment of premiums on the policies of insurance for which application was made, but was given to Appellee only as a deposit to be applied toward payment of the first premium which would be due under the terms of the contracts of insurance ultimately agreed upon by the parties (C. T. 28).

(3) That Appellee issued its Preferred Paid Up Life at age 85 Policy of Insurance upon the life of Mr. Cobin in the face amount of $25,000.00, with Appellee as Beneficiary on or about February 11, 1954; that said policy was not issued as applied for, by Mr. Cobin, in that Mr. Cobin's application was for a policy to be issued at a standard premium rate, and the policy issued by Appellee was not a standard premium rate policy, but was issued at a Special Class A premium rate which was greater than the Standard Premium Rate (C. T. 29).

(4) That in the middle of February, 1954, Appellee offered said policy to Mr. Cobin, but Mr. Cobin refused to accept and rejected said policy and returned it to Appellee for cancellation (C. T. 29).

(5) That Leo Cobin died on March 5, 1954; that on April 16, 1954, Appellee tendered to Appellant the monies

deposited by Mr. Cobin at the time he executed his application and that tender was refused by Appellant; that said tender was timely and promptly made (C. T. 29-30).

(6) That since February, 1954, and until the time of trial, Appellee was in possession of the insurance policy on Mr. Cobin's life and during said period refused to issue or deliver any policy of insurance on Mr. Cobin's life and has denied liability under said policy (C. T. 30).

In its conclusions the trial court concluded:

1. That although Appellee issued its policy on February 11, 1954, to Leo Cobin, said policy was not accepted by Leo Cobin, and was in fact rejected by Leo Cobin, and returned to Appellee for cancellation prior to his death (C. T. 30-31).

2. That at the date of Leo Cobin's death no contract of insurance existed between Appellee and Leo Cobin (C. T. 30).

3. That Appellee is entitled to judgment and that Appellant take nothing by reason of her Complaint, except the sum of $130.00 (C. T. 31).

Thereupon judgment was entered in favor of Appellee (C. T. 31), from which judgment this Appeal has been taken (C. T. 32).

4. General Statement.

This case presents the following significant issue: Where an insurance application accompanied by the initial premium has been accepted by the insurer, and a policy conforming to said application has been issued and deliv-

ered to the insured, may the insurer avoid liability to the Beneficiary widow upon the ground that prior to the insured's death the policy was returned to the Insurer, when prior to any communication to the insured of its acceptance of, or consent to, cancellation of the policy, and before any tender or offer to restore the premium paid had been made, the insured has died?

Appellant submits that the evidence establishes as a matter of law that the policy in question was in full force and effect at the time of Mr. Cobin's death, that any purported offer on Mr. Cobin's part to have the policy cancelled was revoked by his death before acceptance of such offer by the insured, and that the insured's office notation on the policy, "not taken March 3, 1954", uncommunicated to the insured during his lifetime and unaccompanied by any restoration, or offer to restore, the premium, is of no legal effect or significance. This being so, Appellant contends the judgment herein is erroneous, being based on critical findings that are unsupported by the evidence and further contends that erroneous ruling on admissibility of evidence and a serious misconception of the law by the trial court contributed vitally to the ultimate error reflected in the judgment.

The Courts have been a principal agency for the supervision of business morality and ethics in the community. The abuses which have characterized the erstwhile catch-as-catch-can business of selling insurance, which have all too frequently in the past resulted in illusory contracts and unprotected risks because of the unequal bargaining power of the parties has given way to

an enlightened policy of strict enforcement of an insured's right to the protection which he has seemingly purchased and for which he has usually paid in advance.

Appellant believes that this Appeal constitutes a compelling occasion for judicial rectification of a decision which represents a retrogressive application of elementary principles of insurance law, and which invites once again judicial supervision over practices and procedures of insurance companies which can only undermine the confidence of the public and the efficacy of the insurance contract as an instrument of protection rather than a snare for the deluded.

IV.

SPECIFICATION OF ERRORS RELIED UPON.

Upon this Appeal Appellant urges:

1. The Findings of Fact, Conclusions of Law and Judgment on the Complaint are contrary to the law and evidence and cannot stand for the following reasons:

(A) Under the uncontroverted evidence the District Court erred in Finding of Fact II in its finding therein that Mr. Cobin applied for a preferred paid-up life at age 85 policy to be issued *at standard rates* and said finding is contrary to the evidence.

(B) Under the uncontroverted evidence the District Court erred in Finding of Fact IV, in its finding therein that the policy issued by Appellee to Mr. Cobin was not issued as applied for, and said finding is contrary to the uncontroverted evidence that the policy was in fact

issued as applied for and that the deceased paid a premium predicated on the issuance of a Special Class A Policy.

(C) Under the uncontroverted evidence the District Court erred in Finding of Fact V, in its finding therein that Appellee offered the Policy as issued to Mr. Cobin but Mr. Cobin refused to accept the Policy and returned the same for cancellation.

(D) The District Court erred in Finding of Fact VI, in its finding therein that Appellee's tender of the premium on April 16, 1954, some six weeks after Mr. Cobin's death, constituted a timely return of the premium under the circumstances, the uncontroverted evidence being that Appellee had not effected any valid cancellation of the Policy during Mr. Cobin's life time, and the Court erred further in failing to find in this connection (1) that Appellee had at no time prior to Mr. Cobin's death communicated to him its consent to a cancellation of the Policy previously issued and delivered to him; and (2) that at no time prior to Mr. Cobin's death did Appellee restore or offer to restore the premium it had received in consideration of its acceptance of the application and issuance of a policy to him.

(E) Under the uncontroverted testimony, the District Court erred in Finding of Fact VII, in its finding that since the middle of February, 1954, and until the trial of the action, Appellee refused to issue or deliver any policy of insurance upon the life of Mr. Cobin, and the trial court erred further in failing to find that a policy of life insurance had in fact been issued and delivered to Mr. Cobin

and that said policy was never validly revoked or cancelled in Mr. Cobin's lifetime and was in force at the time of his death.

(F) The District Court erred in Paragraph II of its Conclusions of Law, in concluding that no contract of insurance existed between appellee and Mr. Cobin, and in its further Conclusion that the policy issued by appellee was not accepted by Mr. Cobin and was rejected by him and returned for cancellation prior to his death.

(This Specification, and the subsidiary assignments of error thereunder is based upon Point B of the Statement of Points Upon Which Appellant Intends to Rely (C. T. 36).)

2. The District Court committed prejudicial and reversible error in its admission into the record over objection—(1) of evidence violative of the parol evidence rule; (2) of evidence constituting inadmissible hearsay and self-serving declarations; (3) of evidence relative to customs, practices and procedures of the appellee company unknown and uncommunicated to plaintiff's decedent; (4) of evidence in derogation of the attorney-client privilege despite assertion of the privilege; (5) of evidence outside the issues as framed by the pleadings and otherwise immaterial, incompetent, irrelevant or improper.

(This Specification is based upon Point A of the Statement of Points Upon Which Appellant Intends to Rely (C. T. 36).)

3. The District Court erred in its Order of January 7, 1957, denying Appellant's Motion to File a First

Amended Complaint in the form lodged on December 18, 1956, and in requiring the inclusion of Paragraph 6 in the First Amended Complaint as filed on February 18, 1957, as a condition of granting permission to file an Amended Complaint.

(This Specification is based upon Point C of the Statement of Points Upon Which Appellant Intends to Rely (C. T. 36).)

4. The District Court erred in its ruling of February 18, 1957, denying Appellant's Motion to Strike certain of Appellee's proposed interrogatories to be propounded to Harold G. Fogg and Fred E. Stewart and to limit the scope of examination of said witnesses, and that the Court committed prejudicial error in admitting into evidence over objection said interrogatories and the answers thereto, which related to customs, practices, procedures, interpretations, markings and communications of Appellee company and its employees never communicated to the insured or known by him.

(This Specification is based Upon Point D of the Statement of Points Upon Which Appellant Intends to Rely (C. T. 36-37).)

V.

SUMMARY OF ARGUMENT.

1. The judgment can not stand as a matter of law for following reasons:

a. Mr. Cobin applied for, and made advance payment on, the type of policy which appellee issued. Upon

appellee's acceptance of Mr. Cobin's application at its home office, a binding contract of insurance was created.

b. Delivery of the policy to Mr. Cobin was not essential, since his insurance became effective irrespective of his actual receipt of the policy. The provisions of the contract did not require delivery. Nevertheless, Bloome did in fact physically deliver the policy to Mr. Cobin.

c. A policy of insurance having issued and a contract formed, Mr. Cobin could not thereafter unilaterally cancel such policy nor did Bloome, as agent, have authority to do so on behalf of appellee. Cancellation could only become effective by mutual agreement, and could only be manifested by appellee's acceptance of any purported offer of Mr. Cobin to return the policy, by communication of such acceptance to Mr. Cobin, by notification to him that the policy was cancelled and by concurrent refund of the premium.

d. Since appellee did none of these things last referred to, but in fact sent Mr. Cobin a notice postmarked March 9, 1954, stating the date of the next premium due appellee, and since its own policy record card shows that Mr. Cobin's policy did not lapse until March 10, 1954, appellee cannot successfully urge that Mr. Corbin was uninsured at the time of his death on March 5, 1954.

2. The Court committed numerous prejudicial errors in its ruling on the evidence and in its conduct of proceedings prior to the trial of the case.

ARGUMENT.

I.

The Findings of Fact, Conclusions of Law and Judgment on the Complaint Are Contrary to the Law and Evidence and Cannot Stand.

1. Under the uncontroverted evidence the District Court erred in Finding of Fact II in its finding that Mr. Cobin applied for a preferred paid-up life at age 85 policy to be issued at standard rates and said finding is contrary to the evidence.

Finding II of the District Court which finds that Mr. Cobin applied for a policy of insurance to be issued at standard premium rates is not only without evidentiary support but is entirely unwarranted in that it flies directly in the face of the evidence elicited at the trial.

The evidence shows without dispute that all of the insurance then in existence on Mr. Cobin's life had been issued to him at substandard rates, that his insurance rating had been improved by some companies to a maximum of substandard A, that Bloome knew of this from his analysis of Cobin's policies, and that he told Cobin that he was sure that appellee would give him a comparable rating (R. 129-130; R. 41; R. 87).

Bloome testified that he prepared Part I of Mr. Cobin's application at Cobin's home (R. 91-92; R. 130) and incorporated into paragraph 11 of Part I of Mr. Cobin's application the following statement: "Present rating of most recent insurance policies Substandard A". (Pl. Ex. 1; R.

136). Bloome testified that Substandard A was the same as Special Class A, both of them being the lowest premium rating next to a standard rate policy (R. 136-137).

On Mr. Cobin's application, the sum of $69.52 was inserted as the amount charged for the premium (Pl. Ex. 1, par. 20) and the same figure was inserted by Bloome in paragraph 19 of the Agent's Certificate on the back of Part I as the amount of the first regular premium (Pl. Ex. 1, agent's certificate, par. 19; R. 214).

Bloome testified that if he were calculating a standard rate premium as distinguished from the Substandard A rate premium, the premium for Mr. Cobin on a monthly basis would be $50.50 rather than $69.52 (R. 220-221). In point of fact, the sum of $69.52 charged as the first month's premium by Bloome on the agent's certificate was an overcharge by $3.52 (R. 312) and the actual monthly premium as appears from the face of the policy was $66.00 (Pl. Ex. 5).

Thus, it is unmistakably clear that the finding here challenged, namely, that Mr. Cobin applied for a premium at standard rates, is negatived by the overwhelming weight of the evidence. The application on its face discloses that Mr. Cobin was rated immediately below (*i. e.*, next to) standard, and the amount of premium charged and taken in connection with the application shows that a substandard A (Special Class A) policy was applied for. Mr. Cobin was born on July 25, 1916. Had he applied for a policy at standard rates as found by the Court, it is admitted that the monthly premium would have been $59.50 (R. 220-221)

instead of the premium charged, which was for a Special Class A policy in conformity with Mr. Cobin's rating.

The portion of Finding of Fact II here attacked is utterly irreconcilable with this clear-cut evidence and cannot be allowed to stand.

2. Under the uncontroverted evidence the District Court erred in Finding of Fact IV, in its finding therein that the policy issued by appellee to Mr. Cobin was not issued as applied for, and said finding is contrary to the uncontroverted evidence that the policy was in fact issued as applied for and that the deceased paid a premium predicated on the issuance of a special class A policy.

Finding IV, which finds that the policy applied for by Mr. Cobin was for a standard rate policy and that the policy issued was not issued as applied for, but was issued at a Special Class A premium rate which was greater than the standard premium rate, is in direct opposition to the evidence adduced.

Under subsection (1), *supra,* appellant has set forth the evidence which manifests beyond peradventure of doubt that the application signed by Mr. Cobin contemplated the issuance of a policy at a substandard A rate, that the premium calculated by Bloome and advanced by Mr. Cobin was predicated on the issuance of a substandard A policy, and that the Special Class A policy issued was the same as the substandard A rating which Bloome had included in paragraph 11 of the application.

The evidence previously alluded to further establishes that a standard rating would have cost Mr. Cobin only

$59.50 but he was asked for a premium payment of $69.52. Had Mr. Cobin applied for a standard rate policy, there would have been no reason to ask for a premium advance in excess of the standard rate, no reason for Mr. Cobin to pay a first premium higher than the standard rate, and there would have obviously been no authority on the part of the general agent to remit to the appellee company a premium based on a Special Class A rating. The undisputed evidence shows that upon issuance of the policy at a Special Class A rating, General Agent Van Elgort immediately remitted to appellee's home office the premium based on the rating called for by Mr. Cobin's policy which had hitherto been kept in his trust account (R. 293-294).

The record will be searched in vain for a scintilla of evidence that Mr. Cobin objected to the issuance to him of the policy based on the Special Class A rating or for the merest intimation that any of the parties to the transaction regarded the policy as issued to have deviated in any way from the type of policy applied for and for which a payment covering the cost of such policy had been made in advance. On the contrary, Plaintiff's Exhibit 9, a communication of February 11, 1954, between two of appellee's officials, shows that the application was approved as made, and the policy issued the same day (R. 384).

The evidence conclusively establishes that the policy issued by the company was the policy applied for by Mr. Cobin and paid for in advance. Therefore, the portion of Finding IV here challenged is in diametric antithesis to the evidence and cannot be allowed to stand.

3. Under the uncontroverted evidence the District Court erred in Finding of Fact V, in its finding therein that appellee offered the policy as issued to Mr. Cobin but Mr. Cobin refused to accept the policy and returned the same for cancellation.

In connection with the District Court's finding that defendant offered the policy as issued to Leo Cobin but Leo Cobin refused to accept and did reject said policy and returned the same for cancellation, it is vitally important for this Honorable Court to take cognizance of one element of crucial significance which appears wholly to have escaped the lower court, namely, that appellee, having accepted Mr. Cobin's application at its home office and having issued its policy, had caused, at that moment, a completed contract of insurance to come into existence regardless of any physical delivery of the policy to Mr. Cobin. No further act on Mr. Cobin's part was required to give effect to the contract of insurance. Thus, irrespective of any acceptance of the policy by Mr. Cobin, a binding contract of insurance had been effectuated, which could be terminated only by mutual agreement for cancellation.

However, no such mutual agreement of cancellation was ever accomplished in Mr. Cobin's life time, in any manner sanctioned by the law of contracts, or prescribed by the terms of the policy.

In fact, appellee made it clear during the course of the trial that it was never relying on the defense of cancellation, but was proceeding on the theory that Mr. Cobin's acceptance of the policy was necessary to complete the contract. In his opening statement counsel for appellee declared:

"This case is essentially a question of fact which turns upon whether or not a policy of insurance, which was issued by The Midland Mutual Life Insurance Company, the defendant, was ever accepted by the assured—by the applicant, I should say, Mr. Cobin." (R. 30).

"Limitation of Authority: *This policy cannot be varied or altered or its conditions waived or extended in any respect except by written agreement of the Company,* signed by the President, a Vice-President, the Secretary, an Assistant Secretary, or the Actuary, whose authority in this respect shall not be delegated.

*"No agent * * * has power on behalf of the Company, to * * * discharge this or any other contract of insurance * * *."* (Italics added).

So far as is here material, the following language is contained at the bottom of Part I of the application form:

"If a policy is issued hereon, the complete application, Parts I and II, and such policy shall constitute the entire contract. This application is an offer by me for a contract of insurance, and if a deposit is made by me at the time of making this application, the insurance applied for shall not be effective unless and until the Company accepts this application without change at its home office, but if no such deposit is made, the policy, if issued shall not take effect unless and until delivered and the first full premium paid while I am in good health * * *"

It is important to observe that the policy makes no provision for cancellation by the insured.

These contractual provisions, read in the light of the prevailing law, lead inescapably to the conclusion that upon

"This case is essentially a question of fact which turns upon whether or not a policy of insurance, which was issued by The Midland Mutual Life Insurance Company, the defendant, was ever accepted by the assured—by the applicant, I should say, Mr. Cobin." (R. 30).

"Contrary to what Mr. Horwin has said, there is no legal issue in this case as to a cancellation. Our defendant's position is that there was never a contract, therefore, there could be no issue of cancellation. In other words, there was never an acceptance of delivery by the applicant of the contract and, therefore, there would be no contract, and, therefore, there is no issue of cancellation involved in this case.

"It is purely a factual question as to, was the policy accepted by Mr. Cobin or returned to the company and we will offer our evidence to support those issues." (R. 33).

The provisions of the contract between the parties which are here pertinent appear in the policy issued by appellee and in the application signed by Mr. Cobin.

On the face of the policy, it is stated:

"This policy is issued in consideration of the application therefor, a copy of which is attached hereto and made a part hereof, and of the payment of a first premium of $66.00 * * *." (Pl. Ex. 5, p. 1).

The policy provides under title "General Provisions and Benefits" (Page 2):

"The contract: This policy and the application therefor constitute the entire contract between the parties * * * no statement shall avoid this policy or

be used in defense of a claim hereunder unless it is contained in the written application * * *.

"Limitation of Authority: *This policy cannot be varied or altered or its conditions waived or extended in any respect except by written agreement of the Company,* signed by the President, a Vice-President, the Secretary, an Assistant Secretary, or the Actuary, whose authority in this respect shall not be delegated.

"*No agent * * * has power on behalf of the Company, to * * * discharge this or any other contract of insurance * * *.*" (Italics added).

So far as is here material, the following language is contained at the bottom of Part I of the application form:

"If a policy is issued hereon, the complete application, Parts I and II, and such policy shall constitute the entire contract. This application is an offer by me for a contract of insurance, and if a deposit is made by me at the time of making this application, the insurance applied for shall not be effective unless and until the Company accepts this application without change at its home office, but if no such deposit is made, the policy, if issued shall not take effect unless and until delivered and the first full premium paid while I am in good health * * *"

It is important to observe that the policy makes no provision for cancellation by the insured.

These contractual provisions, read in the light of the prevailing law, lead inescapably to the conclusion that upon

appellee's acceptance of Mr. Cobin's application and its issuance of a policy, a contract of insurance arose that was never effectively terminated prior to Mr. Cobin's death.

The rule is well established that where an application is made for a policy of life insurance and a sum of money is paid to the agent of the insurer to be applied on the first premium, if the insurer accepts the application, the contract is complete on the issuance of the policy and no delivery of the policy to the insured, nor acceptance of the policy by him, is essential to make the contract of insurance binding.

Harrigan v. *Home Life Ins. Co.*, 128 Cal. 531, 547, 61 Pac. 99.

Fageol T. & Co. Co. v. *Pacific Indemnity Co.*, 18 Cal.2d 731-739, 117 P.2d 661.

Ransom v. *Penn Mutual Life Ins. Co.*, 43 Cal.2d 420-425, 242 P.2d 633.

Kansas City Life Insurance Co. v. *Cox*, 104 F.2d 321, 325.

Mutual Life Ins. Co. v. *Ford*, 2 Ohio App. 410.

Penn. Threshermen, etc., Ins. Co. v. *Carter*, 197 Va. 776, 91 S.E.2d 429.

Commonwealth L. Ins. Co. v. *McGuire*, 190 Ky. 134, 226 S.W. 402.

Coci v. *N. Y. Life Ins. Co.*, 155 La. 1060, 99 So. 871.

Cooper v. *Pac. Mutual Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705.

In *Harrigan* v. *Home Life Ins. Co., supra,* the Supreme Court of California stated this principle in the following language (128 Cal. 547):

" 'If the company so far accepts the application as to prepare and forward a policy to its agent for delivery, and if payment of the premium has been made,

> or if such payment is not a condition of the policy taking effect * * * the contract is then complete, and the company cannot revoke its acceptance, although the policy had not been delivered.' "

In *Fageol T. & Co. Co., supra,* this rule was reaffirmed in the following language (18 Cal.2d 739):

> "It is next contended that Fageol never accepted the Detroit insurance. Acceptance was wholly unnecessary. Neither the policy nor its endorsement required acceptance by either beneficiary. No statute required such acceptance. Under the custom and practice of insurance companies, as found by the Court, when, following Thomas' application for a policy, it was issued to him, it became, a binding contract for the benefit of the assured and his beneficiaries, for the term specified."

In *Kansas City Life Ins. Co.* v. *Cox,* 104 F.2d 321, 325, the same rule was enunciated in the following language:

> "An unconditional acceptance by an insurance company of an application for insurance makes it binding on both parties *without the issuance or delivery of a policy,* unless the application otherwise provides and when the company approves it as made and issues a policy, it manifests an intention to accept it, resulting in a meeting of the minds and the completion of a contract effective when the first premium is paid (Citations)." (Emphasis added).

So, in the case at bar no provision of the contract required either delivery to the insured, or acceptance of the policy by him as a condition precedent to the formation of a contract. On the contrary, an examination of the lan-

guage of the application previously quoted manifests that where a deposit is made at the time of the application, the insurance applied for becomes effective at the time the company accepts the application as made. Said language indicates that only where no deposit is made does the effective time of the policy depend on delivery to the insured.* In the instant case Mr. Cobin's premium had accompanied his application and had in fact been remitted to appellee.

In construing a comparable clause in an application for insurance, the Supreme Court of California, in the recent case of *Ransom* v. *Penn Mutual Life Ins. Co.*, 43 Cal.2d 420, has held that insurance coverage became effective upon payment of the premium *even before* the application was actually accepted. In the Ransom case the application contained the following clause:

> "If the first premium is paid in full in exchange for the attached receipt signed by the Company's agent when this application is signed the insurance shall be in force, subject to the terms and conditions of the policy applied for, from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan at the rate of premium and for the amount applied for, but that if such first premium is not so paid or if the Company is not satisfied as to such acceptability, no insurance shall

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That language reads: " * * but if *no such deposit* is made, the policy, if issued, shall not take effect unless and until delivered and the full premium paid while I am in good health." (Emphasis added).

be in force until both the first premium is paid in full and the policy is delivered while the health, habits, occupation and other facts relating to the Proposed Insured are the same as described in Part I and Part II of this application and in any amendments thereto."

Ransom had signed the application form and paid the first premium in full. Before accepting the policy, the insurer requested Ransom to submit to a further medical examination, but before this could be arranged Ransom was killed in an automobile accident. The defendant insurer appealed from a judgment against it contending that no contract of insurance was in force at the time of Ransom's death.

In repelling this contention the California Supreme Court stated (43 Cal.2d 425):

"We are of the view that a contract of insurance arose upon defendant's receipt of the completed application and the first premium payment. The clause quoted above is subject to the interpretation that the applicant is offered a choice of either paying his first premium when he signs the application, in which event 'the insurance shall be in force * * * from the date * * * of the application,' or of paying upon receipt of the policy, in which event 'no insurance shall be in force until * * * the policy is delivered.' The understanding of an ordinary person is the standard which must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy. There is an obvious advantage to the company in obtaining payment of the premium when the applica-

tion is made, and it would be unconscionable to permit the company, after using language to induce payment of the premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer. Moreover, defendant drafted the clause, and had it wished to make clear that its satisfaction was a condition precedent to a contract, it could easily have done so by using unequivocal terms. While some of the language tends to support the company's position, it does no more than produce an ambiguity, and the ambiguity must be resolved against defendant (Citations)."

The language of the present application is free from doubt. But, as the Ransom case holds, if there were any doubt from the language of the application that it was intended that an application accepted by payment of a premium should become effective upon issuance of a policy, such doubt would have to be resolved against the insurer under familiar rules of construction.

As stated in *Culley* v. *N. Y. Life Ins. Co.*, 27 Cal.2d 187, 194:

> "In any event any doubt as to the meaning of the policy must be resolved in favor of the insured under well known rules of interpretation (Citations)."

The authorities cited abundantly demonstrate that the learned trial Judge failed to recognize the fundamental rule that the insurance contract sprang into force as a binding obligation upon acceptance of the application by the insurer and that no further act was necessary to lend vitality to the binding effect of the agreement.

The factual context here present however, goes even beyond mere acceptance of the application and issuance of a policy. In the present case, not only was there payment of a premium deposit with the application, approval of the application by the insurer and issuance of a corresponding policy, but there was delivery of the policy to the agent, concurrent transfer of the insured's premium from the agent to the insurer and physical delivery of the policy to the insured, which was retained by him for several days.

As has been pointed out, under the provisions of the contract, delivery of the policy was not required to make the contract binding. To the contrary, acceptance by the insurer resulted in formation of the contract. But even where the contract of insurance expressly required delivery as a condition precedent to the effectiveness of the policy, there are numerous cases which squarely hold that delivery of the policy is accomplished by the mere act of sending it to the insured's agent for delivery to the assured.

Thus in *Courdway* v. *Peoples Mut. Life Ins. Co.*, 118 Cal.App. 530, 533, 5 P.2d 453, the Court states:

> "The delivery of the policy was accomplished by the act of sending it to the agent for delivery to the insured."

In *Meyer* v. *Johnson*, 7 Cal.App.2d 604, 46 P.2d 822, the beneficiary on behalf of the insured, returned two life insurance policies to the agent, stating that they would be acceptable if the premium were made payable semi-annually instead of annually. After issuance of the changed

policy, but before delivery either to the agent or insured, the insured was killed. The Court held the policy binding and stated (page 618):

> "Accordingly, the reissued policies were never delivered to the insured or to the beneficiary or to anyone on behalf of the insured. On similar facts the cases held that there has been but one payment and delivery (Citations)."

In *Schnell* v. *Globe Indemnity Co.*, 42 Cal.App.2d 704, 709, 109 P.2d 1018, it is stated:

> "Certainly there was constructive delivery, because the insurance carrier in sending the policy to their agent did not intend that he should keep it for them, but on the contrary he held it for the insured. This being the case, liability attached under the policy when it was forwarded from the home office (Citations)."

There are numerous cases which hold to the same effect.

See *Bloom* v. *Pac. Mut. Life Ins. Co.*, 85 Cal.App. 419, 428, 259 Pac. 496.

Paez v. *Mut. Indem. Life Ins. Co.*, 116 Cal.App. 654, 656-8, 3 P.2d 69.

Hill v. *Industrial Accident Com.*, 10 Cal.App.2d 178, 184, 51 P.2d 1126.

It being clear from the pertinent authorities that a contract of insurance had been consummated between Mr. Cobin and Appellee, it becomes manifest that Finding of Fact V to the effect that Appellee offered a Policy to Mr. Cobin rests upon the mistaken idea that the parties were still in process of negotiating a contract of insurance at the time the policy was issued. This, of course, is a fallacy,

and the finding here in dispute, namely, that Appellee merely offered a policy to Mr. Cobin, which Mr. Cobin refused to accept is, as a matter of law, prejudicially erroneous and can not be allowed to stand.

4. The District Court erred in Finding of Fact VI.

The District Court erred in Finding of Fact VI in its finding therein that Appellee's tender of the premium on April 16, 1954, some six weeks after Mr. Cobin's death, constituted a timely return of the premium under the circumstances, the uncontroverted evidence being that Appellee had not effected any valid cancellation of the Policy during Mr. Cobin's life time, and the Court erred further in failing to find in this connection (1) that Appellee had at no time prior to Mr. Cobin's death communicated to him its consent to a cancellation of the Policy previously issued and delivered to him; and (2) that at no time prior to Mr. Cobin's death did Appellee restore or offer to restore the premium it had received in consideration of its acceptance of the application and issuance of a policy to him.

As has been previously shown, a contract of insurance arose when Appellee issued its Policy upon the acceptance of Mr. Cobin's application.

This being so, that Policy could only be cancelled or avoided by the parties (1) as provided by Statute, if any; (2) as provided by the terms of the Policy; (3) for fraud or other good cause; and (4) by mutual agreement or consent of the insured and insurer.

29 Am.Jur., Insurance, Section 273, Page 256.
27 Cal.Jur., Insurance, Section 296, Page 796.

There is no governing statute applicable to the policy here involved under the circumstances of this case, and no question of fraud or other circumstance warranting cancellation is here involved.

The Policy itself is silent as to the right of cancellation by either the insurer or the insured. There is thus obviously no right of arbitrary unilateral cancellation by either the insurer or insured. The Policy does state, however, on page 2, in the second paragraph entitled Limitation of Authority—"No agent * * * has power on behalf of the company, to * * * discharge this or any contract of insurance * * *" (Pl. Ex. 5).

Thus, a policy having issued, and accepting Appellee's version of the testimony that the Policy was redelivered to its agent, Mr. Bloome, for purposes of cancellation, this would constitute merely an offer by Mr. Cobin to cancel the Policy, and such cancellation could only be achieved by Appellee's acceptance of the offer to cancel while the offer was still outstanding, upon proper notice to the insured of such cancellation.

In other words, since the Policy makes no provision for cancellation by the insured, and since the Policy expressly removes from the agent any authority to cancel on behalf of the insurer (*Hooker* v. *American Indemnity Co.*, 12 Cal.App.2d 116, 120, 54 P.2d 1128), the asserted delivery of the Policy by Mr. Cobin to Bloome at most would constitute an offer to cancel by mutual agreement, effective, like any other offer, upon communication to insured of the insurer's acceptance of the offer.

Contracts of insurance, including the termination thereof, are governed by rules applicable to contract generally.

Ohran v. *National Automobile Insurance Co.*, 82 Cal.App.2d 636, 645, 187 P.2d 66.

Boyer v. *U. S. Fid. & Guar. Co.*, 206 Cal. 273, 274 Pac. 57.

Yoch v. *Home Mut. Ins. Co.*, 111 Cal. 503, 44 Pac. 189.

It is Hornbook law, requiring no citation of authority, that an acceptance of an offer is not effective until communication to the offeree of the acceptance of the offer.

In the case at bar, assuming appellee intended to accept Mr. Cobin's offer to cancel, at no time did appellee communicate such acceptance to Mr. Cobin during his life time.

Indeed, before any communication with respect to the cancellation of the policy was made to Mr. Cobin, Mr. Cobin died on March 5, 1954, thus revoking by operation of law his offer to cancel the policy, which had not as yet been accepted by appellee.

It is rudimentary that where the offeror dies before his offer has been accepted, the offer is deemed revoked by operation of law.

Shaw v. *King*, 63 Cal.App. 18, 24, 218 Pac. 50.

Williston on Contracts, Sec. 50 A.

The mere fact that in its own office appellee placed a notation on the policy of Mr. Cobin reading "Not Taken March 3, 1954", which was uncommunicated to Mr. Cobin

in his life time and of which he had no notice, does not effect a cancellation of the policy.*

Commenting on a similar situation the court stated in *Hill* v. *Industrial Acc. Com.,* 10 Cal.App.2d 178, 186, 51 P.2d 1126:

> "It is admitted that no formal notice of cancellation of the policy was mailed or otherwise sent or delivered to Hill before the time of the injury of Mrs. Vickers * * *. The only reference to a cancellation of the policy was the words 'cancellation audit' typed on the lower left portion of the page. These words cannot be construed into a notice that the policy was being cancelled or was going to be cancelled at a future date. The maximum information which they might convey on the subject was that the company might be preparing to take steps to cancel the policy. The words fell far short of the information concerning cancellation which the company bound itself to give Hill in the policy issued to him. In that instrument it was provided that to effect a cancellation it must give 'written notice to the other party stating, when less than ten days thereafter, cancellation shall be effective'. It could not cancel its policy by any notice short of the one it had bound itself to give. It did not give such a notice of cancellation."

But what is truly revealing, and especially significant as an admission against interest, is the content of appellee's policy record card, which is Def. Ex. M herein. On that card, the words "Not Taken March 3, 1954" are stricken

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*In a succeeding part of this brief it will be shown that the notation referred to, uncommunicated to Mr. Cobin, was inadmissible under evidentiary rules.

out and a notation appears thereon "Lapsed, March 10, 1954", and "Termination March 10, 1954", in printing. This evidence, combined with the fact that appellee never returned, or offered to return the advance premium to Mr. Cobin before his death, and coupled with the fact that on March 9, 1954, a notice was sent to Mr. Cobin informing him that the next premium was due, clearly indicate that as of the date of Mr. Cobin's death on March 5, 1954, appellee had not accepted the offer to cancel, considered the policy then in force and not until March 10, 1954, five (5) days after Mr. Cobin's death, did appellee regard the policy as lapsed.

The failure to return an unearned premium, the failure of insurer to give notice of cancellation, the request for premium from the insured and the insured's own policy record card which shows that the policy was treated as not lapsed until March 10, 1954, and terminated on that date unequivocally establish that the policy was in full force on March 5, 1954, when Mr. Cobin died.

In *Ohran* v. *National Automobile Ins. Co.,* 82 Cal.App.2d 636, 187 P.2d 66, where the insurer collected a premium for a period during which the insured died and stated in a letter that the policy would not lapse until a particular date, the court held that this constituted an admission that the policy was in force at the time of death. The court stated (p. 646):

> "Not only the words emphasized but also the collection by respondent of earned premium up to March 26, 1953, constitute admission that the policy was in full force and effect up to March 26, 1953 * * *"

In *Lincke* v. *Mut. Benefit, etc., Assn.*, 76 Cal.App.2d 222, 172 P.2d 912, the question involved was whether a policy had lapsed on July 1, 1942. The insured was killed on July 2, 1942. Among her effects were found two letters from the insurer to the insured, dated July 17, 1942 and July 31, 1942, each containing the salutation, "Dear Policyholder" and requesting payments of premium by a particular date in order to reinstate the policy which had lapsed on July 1, 1942. In holding the policy to be in effect at the date of death, the court stated (p. 226):

> "It is clear from these letters that defendant did not regard the policy forfeited and cancelled and all rights under it terminated by reason of the failure to pay the premium due on July 1, 1942. The salutation, 'Dear Policyholder' is significant."

To the same effect is *Hill* v. *Industrial Acc. Com.*, 10 Cal.App.2d 178, 187, 51 P.2d 1126.

(It is pertinent to observe that along with the letter of March 9, 1954, by which appellee notified Mr. Cobin that a premium payment was due, there was included appellee's 48th Annual Report "To our Policyowners.")

Separate and apart from the fact that the evidence is without dispute that no acceptance of Mr. Cobin's offer to cancel was communicated to him, and separate and apart from the above evidence contained in appellee's records and manifested by its conduct which reflect that appellee treated the policy as in force subsequent to Mr. Cobin's death, a further vital fact must be considered, namely, the requirement that a notice of cancellation be given to the insured to render the cancellation effective is a *sine*

qua non in matters dealing with cancellation of insurance policies.

It will be observed that in the case at bar, the policy makes no provision for cancellation by either insurer or insured. But even in cases where the provisions of a policy authorized cancellation by the insurer, such cancellation is ineffective until the insured has received notice of cancellation at the place where the insured can be reached.

Farnum v. *Phoenix Ins. Co.*, 83 Cal. 248, 256, 23 Pac. 869.

Naify v. *Pac. Indemnity Co.*, 11 Cal.2d 5, 10, 76 P.2d 663.

Joshua Hendy M. Works v. *Ins. Co.*, 86 Cal. 248, 24 Pac. 1018.

This Honorable Court has had recent occasion to affirm the principle that cancellation prior to receipt of actual notice is ineffective in the case of *Traders & General Ins. Co.* v. *Champ*, 225 F.2d 802.

In that case, the insurer sent a notice of cancellation to the insured at the wrong address. Subsequent thereto the insured was involved in an accident. The insurer contended it was not liable on the policy because it had mailed a notice of cancellation. In affirming a judgment against the insurer, this Honorable Court stated (p. 806):

> "We are satisfied the trial court was correct under the California law in holding the cancellation here ineffective, at least prior to receipt of actual notice."

That this Honorable Court would endorse such a rule ndependently appears from the statement on Page 805 f the above cited opinion, where it is stated:

> "Parenthetically, we think if it were ours to decree, there would be no harm in a rule of law that no notice of cancellation (where there was no fraud on the part of the insured) could be effective until it reached the insured, provided the insured had left open the channels of communication to him and had not removed himself an unreasonable distance away."

Here, the record conclusively shows that no notice of cancellation was even sent to Mr. Cobin before he died on March 5, 1954.

On the contrary, the first communication sent to Mr. Cobin by appellee occurred subsequent to his death, when appellee mailed to Mr. Cobin a notice postmarked March 9, 1954, informing him that the next premium of $66.00 was due on the policy on March 24, 1954 (Pl. Ex. 10), a fact and circumstance clearly irreconcilable with any cancellation of the policy.

Appellant believes that from the foregoing argument and authorities, it can not be doubted that having failed in Mr. Cobin's life time to accept his purported offer of cancellation and having failed to notify Mr. Cobin of any purported cancellation, appellee is in no position to urge that any legally effective cancellation ever occurred which would deprive the beneficiary herein of her rights under the policy as issued.

Nevertheless, one other fact of extreme significance must also be pointed out, namely, that appellee made no

offer to restore the premium it received from the policy it had issued until 25 days after it learned of Mr. Cobin's death.

There is thus presented the question of the necessity for a refund of the premium to effect a valid cancellation.

Normally, whether or not a cancellation of a policy requires the refund of the premium in order to be effective involves the interpretation of the language of the policy.

> *Quong Tue Sing* v. *Anglo-Nevada Ins. Co.*, 1890, 86 Cal. 566, 25 Pac. 58.
>
> *Naify* v. *Pac. Indemnity Ins. Co.*, 11 Cal.2d 5, 10, 76 P.2d 663.

However, no question of construction is here involved since the policy contains no provisions with respect to cancellation or refund of the premium.

Under such circumstances the rule germane to the situation is expressed in Richards on Insurance (5th Ed., Vol. 3, Section 415, P. 1369):

> "In the absence of policy provisions or statutory language to the contrary, as delineated below, the repayment or tender of unearned premiums is a condition precedent or prerequisite to cancellation of a policy by the insurer. *Clearly, in the absence of any cancellation clause whatsoever, the return or tender of the unearned premium is mandatory if the validity of the insurer's cancellation is to be upheld.*" (Italics added).

The author, referring to the case of *Genone* v. *Citizens Ins. Co.*, 207 Ga. 83, 60 SE2d 125, observes that the court in the Genone case noted that conflicting rulings of the courts, rested upon the particular wording of the given cancella-

tion clause. The following language is then quoted from the Genone case (Richards, *ibid.*, p. 1370):

> "These rulings may be grouped into five categories; First, where the wording of the policy makes a return of the unearned premium a condition precedent to cancellation; second, where the policy construed was a standard fire policy; *third, where the cancellation clause was silent as to return of unearned premium;* fourth, where the provision for return of the unearned premium was ambiguous; and fifth, where the obligation to return the unearned premium was, by the terms of the contract, plainly made a consequence and not a condition of cancellation. *The weight of authority is that, if the terms of the cancellation clause fall within any one of the four groups, a tender or return of the unearned premium is necessary to effect cancellation* * * *." (Emphasis supplied).

This rule is supported not only by the weight of authority but reflects the principle embodied in Section 481 of the California Ins. Code, which provides in part:

> "Unless the insurance contract otherwise provides, a person insured is entitled to a return of premium if the policy is cancelled * * * as follows:
>
> 1. To the whole premium, if no part of his interest in the thing insured is exposed to any of the perils insured against.
>
> 2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time * * *."

Similarly, had appellee desired to effect a cancellation, it was required not only to give notice, which it failed to

do, but to have restored, or at least have offered to restore, the premium paid, which it likewise failed to do in Mr. Cobin's life time.

For all of the foregoing reasons, Finding of Fact VI is erroneous, since the uncontroverted evidence shows that appellee had not effected any valid cancellation of the policy during the life time of Mr. Cobin; that appellee at no time prior to Mr. Cobin's death communicated to him its consent to a cancellation of the policy issued; that appellee at no time sent him a notice of cancellation nor did it restore nor offer to restore the premium it had received in consideration of its acceptance of the application and issuance of a policy to Mr. Cobin.

5. Under the uncontroverted testimony the District Court erred in Finding of Fact VII.

Under the uncontroverted testimony the District Court erred in Finding of Fact VII, in its finding that since the middle of February, 1954, and until the trial of the action, appellee refused to issue or deliver any policy of insurance upon the life of Mr. Cobin; and the trial court erred further in failing to find that a policy of life insurance had in effect been issued and delivered to Mr. Cobin and that said policy was never validly revoked nor cancelled in Mr. Cobin's life time and was in force at the time of his death.

It would be a work of supererogation to review the facts and argument which have been set out above and which amply demonstrate that appellee had in fact issued a policy of life insurance to Mr. Cobin in the middle of

February, 1954, that its agent had in fact physically delivered said policy to Mr. Cobin in the middle of February, 1954, that Mr. Cobin had fully prepaid a month premium for said policy, that said premium was delivered to appellee by its agent and retained by it for several weeks after Mr. Cobin's death, that appellee never gave Mr. Cobin notice of any purported cancellation before his death, that its own policy record card shows that far from being cancelled, the policy lapsed March 10, 1954, five (5) days after Mr. Cobin's death, and the fact is that on March 9, 1954, four (4) days after Mr. Cobin's death, appellee sent Mr. Cobin a notice not that the policy was cancelled, but that the premium was due on March 25, 1954.

The thrust of these facts irrevocably manifests that the finding herein challenged, as in the case of every other finding made by the Court and discussed in the preceding section of this brief, is not sustained by any substantial evidence.

6. The District Court erred in Paragraph II of its Conclusions of Law, in concluding that no contract of insurance existed between appellee and Mr. Cobin, and in its further Conclusion that the policy issued by appellee was not accepted by Mr. Cobin and was rejected by him and returned for cancellation prior to his death.

Appellant has, hereinabove, discussed each and every material Finding made by the Court. Appellant respectfully submits that not only does the evidence fail to support any of the material Findings made, but the law applicable to the facts of this case conclusively establishes that the policy issued to, and paid for, by Mr. Cobin was in full force

and effect at the time of his death. As a necessary consequence, Conclusion II, flowing as it does from findings without support in the record and upon a mistaken concept of the principles of law apposite to this case, is completely unjustified and unwarranted.

Appellant respectfully submits that not only do the facts of this case compel a reversal of the decision to avoid a miscarriage of justice but it is further urged that such reversal should be accompanied with a direction to enter judgment for appellant, since under a correct view of the facts established, the Conclusion must inevitably follow that Mr. Cobin was insured at the time of his death, and that his widow, the plaintiff and appellant herein is entitled to recovery as beneficiary under that policy.

Under a fact situation no more compelling than in the case at bar, this Honorable Court very recently vacated a judgment in favor of an appellee and directed a judgment in favor of appellant. That case is *Centennial Ins. Co.* v. *Schneider*, 247 F.2d 491. At page 494 of that opinion, this Honorable Court, speaking through Judge Bone, gave expression to a rule which clearly applies to all of the findings made herein, and to the ultimate result reached below:

> "Under Rule 52(a) of the Fed. Rules Civ. Proc., 28 U.S.C.A., a finding is clearly erroneous when, although there is evidence to support it, a reviewing court on reviewing the entire evidence is left with a definite and firm conviction that a mistake has been made. United States v. U. S. Gypsum Co., 1948, 333 U.S. 364, 395-396, 68 S. Ct. 525, 92 L.Ed. 746; Smyth v. Erickson, 9 Cir., 1955, 221 F.2d 1, 4; Alaska Freight Lines v. Harry, 9 Cir., 1955, 220 F.2d 272, 275. Cf.

United States v. One 1950 Buick Sedan, 3 Cir., 1956, 231 F. 2d 219, 223, on drawing reasonable inferences from 'basic facts.'

"After a complete study of the evidence we are left with the conviction that a mistake has been made."

Appellant feels that after reviewing the entire record, this Honorable Court will entertain the firm and definite conviction that a mistake was made by the trial court which should not remain unrectified.

II.

The District Court Committed Prejudicial and Reversible Error in Its Admission into the Record over Objection—(1) of Evidence Violative of the Parol Evidence Rule; (2) of Evidence Constituting Inadmissible Hearsay; (3) of Evidence Constituting Self-Serving Declarations; (4) of Evidence Relative to Customs, Practices and Procedures of the Appellee Company Unknown and Uncommunicated to Plaintiff's Decedent; (5) of Evidence in Derogation of the Attorney-Client Privilege Despite Assertion of the Privilege; (6) of Evidence Outside the Issues As Framed by the Pleadings; (7) of Evidence Otherwise Immaterial, Incompetent, Irrelevant or Improper.

The District Court, throughout the trial committed reversible error by its rulings on the admission of evidence. That the record is infected with serious error appears from the prolific mass of inadmissible testimony which the Court received in evidence and which seriously prejudiced appellant's case.

1. The trial court erred in admitting evidence violative of the parol evidence rule, and in admitting otherwise improper testimony.

Throughout the trial, appellee offered evidence of surrounding circumstances, of negotiations between the parties prior to issuance of the policy, of discussions that Mr. Cobin had with third party strangers, despite the fact that a policy of insurance had been issued which contains no ambiguity, required no interpretation and had superseded prior negotiations.

The following occurred during cross-examination of plaintiff by Mr. Duque, appellee's counsel:

> "Q. (To Mrs. Cobin) And did you have any conversations with him during that year or the subsequent years regarding the buying of insurance policies? (Note: Reference was to conversations preceding the application of December 14, 1953.)
>
> "Mr. Horwin: Just a second. To which I object, your Honor, upon the ground that there is a written application and a written policy which supersedes all prior conversations and negotiations, so that the question as to any conversations preceding the application would be irrelevant.
>
> "The Court: I will overrule the objection.
>
> "Mr. Horwin: It is not a part of the res gestae. It is also violative of the parol evidence rule.
>
> "The Court: I will overrule the objection. You may relate the conversation." (R. T. 34).

(Again with regard to conversations preceding the application:)

> "Q. Will you tell us what was said by you and Mr. Bloome and Mr. Cobin?

"Mr. Horwin: Just one moment, Mrs. Cobin.

"To which I object and wish to call the Court's attention at this time to the law in regard to prior conversations with a deceased insured.

"The Court: What page of your Brief is that cited on?

"Mr. Horwin: I am referring in particular to the case of Paez v. Mutual Indemnity, etc., Insurance Company, 116 Cal. App. 654, 4th District, 1931.

"The Court: What page is that on in your Brief?

"Mr. Horwin: Well, you don't have a page there. For accommodation of counsel and the Court I will hand to the Court an original and copy of a Memorandum of Law on this subject, and a copy for counsel.

"The Court: That is 116 Cal. App. 654, Paez v. Mutual Indemnity.

"Mr. Horwin: The first one was the Paez case, that is right, Your Honor.

"The Court: Well, I previously overruled the objection. This is a further argument on the objection, then, isn't it?

"Mr. Horwin: Well, the point is, I know I did not offer any authorities on this subject in my supporting Memoranda, and I know the Court wants to avoid any error and that it is my duty to call the Court's attention to the authorities.

"The Court: The Court is willing to let the ruling stand. I don't know whether Mr. Duque wants to argue the matter. I overruled the objection, and let the conversation go in." (R. 34-36).

Thereafter the following took place on cross-examination of plaintiff:

"Q. All right. Will you tell us what was said and done at that meeting, please? (Note: Reference

to conversation of December 14 preceding the application.)

"Mr. Horwin: Just a moment, please. May it be understood that my objection is continuing upon the basis of violation of the parol evidence rule, and the authorities offered with regard to declarations and statements of a deceased, and this not being a part of the res gestae.

"The Court: The record will show that Mr. Horwin has made his objection. The Court will overrule the objection. You may answer."

(R. T., pp. 38-41).

"Q. Was this the first and only time that Mr. Bloome called you and told you that there was an appointment made for you and Mr. Cobin to be examined by the Midland Mutual doctor? (Note: Reference was to conversations between Louise and Bloome with regard to medical examination between time of application and time of issuance of the policy.)

"Mr. Horwin: Just a moment. To which I object on the grounds that the question of appointments with the doctors is irrelevant to the case and that the conversations with regard to setting up appointments with the doctor, which is not in issue in this case, is likewise irrelevant, besides being violative of the parol evidence rule.

"The Court: The Court will overrule the objection."

(R. T. p. 47.)

"Q. By Mr. Dugue: Well, isn't it a fact, Mrs. Cobin, that Mr. Bloome called you and called your husband and made several appointments with the Midland Mutual doctor, and that you and Mr. Cobin never kept any?

"Mr. Horwin: The same objections.

"The Court: I will overrule the objection."

(R. T., p. 47.)

"Q. By Mr. Duque: Isn't it a fact, Mrs. Cobin, that your husband indicated to you that he was not sure that he wanted these contracts and therefore it was not necessary for you to go and have your medical?

"A. No, sir.

"Mr. Horwin: Just a second. The same objection and also objected to as incompetent, because it is relating to supposed declarations of the deceased and without regard to the occasion of the res gestae.

"The Court: I will overrule the objection and let the answer remain. She has already given it."

(R. T., p. 48.)

"Q. Now, do you recollect having received a letter from the Midland Mutual Life Insurance Company telling you in effect that the policy would not be issued and that they were not going to issue the policy unless you went and had your medical examination?

"Mr. Horwin: Just a minute. Objected to upon the grounds that the subject matter is irrelevant. A policy was issued by the Company and whether they complained about medical examination or wanted it earlier or wanted it later or continued it or anything else would be irrelevant to the case.

"The Court: I will overrule the objection."

(R. T., pp. 48-49.)

Again, during cross-examination of plaintiff, the following occurred:

"Q. Did you or Mr. Cobin, or either of you, in each other's presence, have any conversation with Mr. Koff (Note: Agent for another insurance company)

concerning the estate planning which was being done by Mr. Cobin in connection with the recommendation of the Title Insurance & Trust Company?

"Mr. Horwin: Objected to as incompetent, irrelevant and immaterial.

"The Court: I will overrule the objection. She may answer."

(R. T., p. 72.)

"Q. By Mr. Duque: Did your husband ever tell you that he had any conversations with Mr. Koff regarding the Midland Mutual policies?

"Mr. Horwin: Just a second. That is objected to as not within the res gestae of the case, an improper query for declarations of the deceased, violative of the parol evidence rule, incompetent, irrelevant and immaterial.

"The Court: The Court will overrule the objection."

(R. T., p. 72.)

"Q. Mrs. Cobin, isn't it a fact that at the time your husband had the discussions with Mr. Koff about the Midland policies, that there was in existence on his life a policy of insurance with the Manhattan Life Insurance Company?

"Mr. Horwin: Objected to as irrelevant.

"The Court: I will overrule the objection."

(R. T., p. 75.)

"Q. Mrs. Cobin, in addition to the Manhattan Life Insurance policy which existed on the life of your husband and which was in the face amount of $56,000.00, what other life insurance policies did he have in force during his lifetime?

"Mr. Horwin: Just a second. Objected to as incompetent, irrelevant and immaterial. We are not suing on the other life insurance policies.

"The Court: I will overrule the objection. She may answer."

(R. T., p. 79.)

"Q. By Mr. Duque: In other words, Mrs. Cobin, were you or were you not having business dealings with Mr. Bloome (Reference is to dealings with the Company's agent, after the death of the insured) with regard to insurance policies on your life?

"Mr. Horwin: Objected to as immaterial, not within the issues of this case and incompetent evidence.

"The Court: I will overrule the objection."

(R. T., p. 81.)

During the direct examination of appellee's agent Bloome by appellee's attorney, the following occurred with reference to a meeting at the Cobins' home when the application was signed:

"Q. Now, at that same meeting in the evening or afternoon at the Cobins' home what, if anything, was said regarding the type or nature of the policies which Mr. Cobin wanted on his life or on the life of his wife?

"Mr. Horwin: Objected to on the grounds that the application will speak for itself. It is the best evidence. The parol evidence rule precludes this kind of testimony and it is not part of res gestae.

"The Court: I will overrule the objection."

(R. 93.)

"Q. What if anything was said at that conversation about the premium?

"Mr. Horwin: The same objection.

"The Court: I will overrule the objection."

(R. 93.)

Bloome was questioned regarding a conversation with the deceased and his wife with respect to a medical examination before issuance of the policy, as follows:

> "Q. And will you state the conversation?
>
> "Mr. Horwin: I object to this testimony on the grounds that the testimony is not competent, irrelevant and immaterial; upon the further grounds that there is no proper foundation, in that no claim is made in the answer in this case that a medical examination did not take place or that because of the failure of the medical examination a policy did not issue, but on the contrary the defendant contends a policy did issue.
>
> "The Court: I will overrule the objection. You may answer."
>
> (R. 101-102.)

Mr. Duque questioned Bloome about another conversation with the deceased before issuance of the policy:

> "Q. And when was the next conversation that you had with him?
>
> "A. Mr. Cobin and Mrs. Cobin did not keep the appointments and so I talked with Leo and Louise, two or three or four or five times in regard to the reasons of the delay.
>
> "Mr. Horwin: I move to strike the testimony on the grounds that it is not responsive to the question and upon all the grounds with regard to the impropriety.
>
> "The Court: I will deny the motion to strike."
>
> (R. 103.)

Upon redirect examination by Mr. Duque of Bloome, a question was asked with reference to the agent's pro-

posal which preceded the application for insurance with appellee:

"Q. Was this proposal for insurance a proposal for the issuance of a policy on a standard rate or on a rated basis?

"Mr. Horwin: Just a second. To which I object upon the grounds that the instrument is the best evidence of what it purports to be. If it is a proposal, the terms thereof can be read by the Court. That this is a most obvious effort now to violate the parol evidence rule and go beyond mere violation by introducing purported conversations, not even referring to a conversation, just asking the witness to give his interpretation.

"The Court: I will sustain the objection.

"Mr. Duque: May we offer this in evidence, your Honor. It is marked as plaintiff's Exhibit 15.

"The Court: It speaks for itself.

"Mr. Duque: But it is only for identification.

"The Court: But we will make it an Exhibit at this time.

"The Clerk: It is 15.

"The Court: Mr. Duque said it is only in for identification, but he is now offering it in evidence.

"Mr. Duque: I am now offering plaintiff's Exhibit 15.

"Mr. Horwin: To which we object.

"The Court: I will overrule the objection.

"Mr. Horwin: In making my objection I want the record to show I am referring to the objections I have already made with regard to this document at the time it was offered for identification.

"The Court: Yes. (Said document previously marked plaintiff's Exhibit 15 was received in evidence.)" (R. 261, 262.)

During the examination of appellee's general agent, Mr. Van Elgort, by Mr. Duque, appellee's counsel, the following occurred:

> "Q. Now, aside from the deposition, Mr. Van Elgort, in cross examination Mr. Horwin asked you a question to the effect that the payment which had been made by Mr. Cobin on his Application was a payment for a sub-standard A rated policy. Now, I show you the Application on Mr. Cobin and ask you whether this Application is for a non-rated policy or for a rated sub-standard A policy?
>
> "Mr. Horwin: To which I object on the grounds that the question in my opinion is a very gross example of an attempt to adduce violation of the parol evidence rule and also an attempt to adduce a conclusion, also an attempt to usurp the Judge's function with regard to the construction of a written instrument.
>
> "Mr. Duque: If the Court please, Mr. Horwin asked the question and I believe I have every right to rebut it by this testimony. I will admit that I would not have had the right otherwise.
>
> "Mr. Horwin: I didn't ask it. I did not ask that at all.
>
> "The Court: I will overrule the objection." (R. 310).

Appellant has not attempted to exhaust the instances in which evidence of conversations and negotiations leading up to issuance of the policy were admitted over objection. The record is replete with other examples, notably in the testimony of one Harry Koff (R. 167-176).

The admission of this plethora of evidence of negotiations and conversations prior to the issuance of the policy

vas, it is submitted, a clearly erroneous violation of the arol evidence rule.

It is a well established rule of substantive law that vidence of conversations and negotiations leading up to xecution of a contract in writing is inadmissible, since uch conversations and negotiations are deemed to have een merged in the contract.

Lifton v. *Harshman,* 80 Cal.App.2d 422, 432.
Spangenberg v. *Nesbitt,* 22 Cal.App. 274, 281.
Maxwell v. *Carlon,* 30 Cal.App.2d 356, 361.
Simon v. *Bemis Bros. Bag Co.,* 311 Cal.App. Sec. 378.

2. The District Court committed prejudicial and reversible error in its admission into the record over objection of evidence which constituted inadmissible hearsay and self-serving declarations.

Over appellant's objection, the Court permitted Richard Grosten, general agent for Manhattan Life Insurance Company, not a party to the action, to testify to conversations he had with business associates and officials of his company with respect to a policy owned by Mr. Cobin, and issued by the Manhattan Company (R. 183). Some of these discussions took place more than a year before the policy in question was applied for by Mr. Cobin (R. 180).

These conversations were clearly hearsay as to appellant and were irrelevant and incompetent to any issue here involved.

Mr. Van Elgort, general agent for appellee, was permitted over objection to introduce in evidence a letter pur-

portedly written by him on February 22, 1954, to a member of appellee's company (R. 277-278; Def.'s Ex. I).

This letter reads as follows:

"February 22, 1954

Mr. Charles Grady
Midland Mutual Life Insurance Co.
Columbus, Ohio

Dear Mr. Grady: RE: Pol. #243946-47
Leo Cobin and Louise Cobin

The above policies were paid the company in error. Please return the premium of $123.50 paid in to the company on February 15th.

We had put these through on 10.8 plan for Mr. Chester Bloome the agent and had received the check for this commission on Friday and it is being returned to you herewith.

Yours very truly,

/s/ S. Van Elgort
S. Van Elgort, C.L.U."

SVE:ca

Clearly the admission of this letter was erroneous both on the grounds of hearsay and as a self-serving declaration. An examination of the letter shows the prejudicial character of this incorrect ruling by the Court.

Confronted with a similar situation in *Bloom* v. *Pacific Mutual Life Insurance Company,* 85 Cal.App. 419, 259 Pac. 496, the Court stated (85 Cal.App. 430):

"In further support of its appeal appellant alleges that the Court erred in refusing to admit in evidence a letter written by the defendant to Stillman, dated June 30, 1923. Also in refusing to permit in

evidence a letter from Stillman to the defendant returning the policies to the defendant, and a letter from the defendant's San Francisco office to Stillman, dated June 15, 1923. As to the third letter just mentioned, it refers to the fact that the defendant had issued a form of policy different from that actually applied for. As to the two other letters referred to, no authorities are cited to support the contention of appellant that private correspondence between the defendant and its agent, after the occurrence of an event, is admissible, and we assume that none can be cited, as it is self-evident that statements and letters passing between a principal and an agent in support of a defendant's contentions do not constitute evidence against a third party, though they may be admissible as admissions of a party writing the same when offered as admissions against interest."

Over objection, Mr. Van Elgort was permitted to testify that Bloome did not receive a commission on the policy issued on Mr. Cobin's life (R. 285).

This was clearly incompetent, irrelevant and immaterial, and a self-serving declaration which was erroneously admitted.

Numerous other instances of the reception of hearsay and self-serving declarations of a most serious character are referred to in Section 3 next following.

3. The District Court committed prejudicial and reversible error in its admission into the record, over objection, of evidence relating to customs, practices and procedures of the appellee company unknown and uncommunicated to plaintiff's decedent.

The Court received in evidence the deposition upon written interrogatories of Fred E. Stewart, Manager of the

Policy Record and Premium Collection Division of appellee's home office (R. 318). Over objections, Mr. Stewart testified as to the methods by which allegedly "Not Taken" policies are processed at the home office (R. 321-322). Over continued objections, he testified that he placed the legend "Not Taken March 3, 1954" on Mr. Cobin's policy after the policy reached his desk with the information that it was refused by the applicant, whereupon, he marked it "Not Taken." (R. 323-325). Mr. Stewart testified that he placed the mark thereon on March 3, 1954 (R. 326).

The following are characteristic excerpts from Mr. Stewart's testimony:

> "Q.13. Under what circumstances did you first see policy No. 243946 (Mr. Cobin's policy)?"
>
> "Mr. Horwin: Objection, for the same reasons just stated under the proceeding." (That objection related to irrelevancy, immateriality and incompetency of the evidence and the fact that it was not binding on plaintiff).
>
> "The Court: I will overrule the objection."
>
> "Mr. Duque: A. Well, it was placed on my desk from the incoming mail when it came to my desk to be processed as 'Not Taken'." (R. 323-324).
>
> "Q.15. On the cover page of Policy No. 243946, there appears in red ink the following 'Not Taken March 3, 1954'. Did you place these marks on Policy No. 243946?"
>
> "Mr. Horwin: Objection, for the reason that neither the insured or the beneficiary can be bound by any claimed marks placed by the insurer upon a life insurance done without the communication to the insured or beneficiary."

"The Court: I will overrule the objection."

"Mr. Horwin: Pardon me a minute. Any such claimed marks are incompetent, irrelevant and immaterial, not within the issues and not the best evidence as to the insured and beneficiary. Further objection is made that said claimed marks would be self-serving declarations as to the insured and beneficiary."

"The Court: I will overrule the objection."

"Mr. Duque: 'A. Yes'." (R. 324).

"Q.16: If your answer to the preceding interrogatory is yes, please state the purpose of and circumstances surrounding the placing of said marks on Policy No. 243946?"

"Mr. Horwin: The same objection for the reason as under the preceding objection."

"The Court: I will overrule the objection."

"Mr. Duque: A. The policy reached my desk with the information that the policy was refused by the applicant. I accordingly marked it 'Not Taken on March 3, 1954'."

"Mr. Horwin: Objection. Pardon me. Motion to strike so much of the answer as contains the following words, 'with the information that the policy was refused by the applicant. I accordingly' — My reason for the motion to strike is that the words 'information that' such and such was refused by the applicant is itself a conclusion and the only proper testimony would be by reference to the particular document or particular thing that is supposed to communicate information. This is a pure conclusion."

"The Court: I will deny the motion to strike." (R. 325).

Mr. Stewart was permitted to explain the meaning of the marks he placed on the policy (R. 326), and whether

the marks he placed on Mr. Cobin's policy were in conformity with the practices and procedures of appellee (R. 327), and in the balance of his testimony was permitted to answer many questions that constituted hearsay and self-serving declarations (R. 327-332).

The Court also received the deposition upon written interrogatories of Harold Fogg, Manager of the Methods and Procedures Division, comptroller department, of appellee company (R. 340).

Mr. Fogg testified regarding appellee's practices and procedures with respect to preparation and mailing of premium notices, over continuing objections by appellant (R. 345 to 349).

After testifying that appellee had no records of the premium notices sent out with respect to Mr. Cobin's policy (R. 350), Mr. Fogg was permitted to answer questions as to the marking "Not Taken March 3, 1954," over objections that the question called for conjecture, surmise, hypothesis and was not binding upon the insured or plaintiff (R. 351).

In further questions, Mr. Fogg was permitted to testify as to how appellee kept its records in the Tabulation Division; he was permitted to surmise how and when the premium notice of March 9, 1954, was mailed to Mr. Cobin, and was permitted to introduce into evidence documents of appellee of which neither Mr. Cobin nor appellant had any knowledge (R. 352 to 385; Deft. Exs. K, L, and M).

It will be readily apparent that the admission of the evidence referred to by the depositions of Mr. Stewart and Mr. Fogg was improper and greatly prejudiced appellant's

case. None of these practices and procedures were in any way known to Mr. Cobin or to appellant, and the only facts and procedures binding upon the insured or appellant would be those only which might have been communicated to them.

A reading of the record shows that despite objections that the customs, procedures and practices of appellee were not binding on appellant or Mr. Cobin, and despite the fact that the testimony of Mr. Fogg and Mr. Stewart was replete with hearsay, self-serving declarations and wholly immaterial and incompetent evidence, the Court nevertheless permitted the introduction thereof.

In *Paez* v. *Mutual Indemnity Insurance Company,* 116 Cal. App. 654, 3 P.2d 69, the court stated the rule here applicable (116 Cal. App. 660):

> "Appellant offered evidence as to the customs of the delivery of its policies transmitted to its agents for delivery, which, on objections of respondent, the court excluded. Proof of customs is not admissible to oppose or alter a rule of law or to change the legal rights or liabilities of parties as fixed by law. So also where a contract was not made with reference to customs evidence as to the existence thereof is immaterial * * * Usage should not be regarded at all unless it be of such a character as may be supposed to influence the parties to the contract. The evidence offered was as to the custom between the appellant and its agents. It was not shown, nor did appellant pretend that the insured knew or dealt with appellant with this usage in mind * * *."

In *Miller* v. *Stults*, 143 Cal. App. 2d 592, 300 P.2d 312, the court pointed out that evidence of custom or usage is inadmissible except as an instrumentality for the interpretation of a contract and then only when the parties to the contract were aware of the existence of the practices sought to be introduced (143 Cal. App. 2d 601-603).

In *Dutton D. Co.* v. *United States F. & G. Co.*, 136 Cal. App. 574, 247 Pac. 594, the trial court refused to admit evidence of custom and procedure in the insurance world in order to prove that a particular contract had not in effect been made. In holding that proof of custom was not admissible for the purpose, the court stated (136 Cal. App. 578-579):

> "The third point is that the trial court erred in refusing to allow the defendant to introduce evidence to show that the custom and usage in the insurance world was not to enter into oral contracts of compensation insurance. It is not claimed that such evidence would have assisted the court in interpreting any specific clause of the alleged contract. It is claimed that such evidence would have created a circumstance tending to show that the officers of the defendant corporation never made the alleged contract. For that purpose the evidence was not admissible. In Barnard v. Kellogg, 77 U.S. 383, at page 390 (19 L.Ed. 987), Mr. Justice Davis speaking for the court said: 'The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract whether written or in parol, which could not be done without the aid of this extrinsic evidence.' In 17 C.J. 508, Section 77, the author says: 'Where the terms of an express contract are clear and unambiguous they

cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is written or parol.' * * * In Lane v. Bailey, supra, the court said: 'The offer of the defendants to prove that it was the practice of their firm, on extending time, to demand collaterals, was not admissible. The question as to the extent of the pledge depended entirely on the agreement; and this was ascertainable from what was said or done by the parties, at the time, in relation to this particular transaction. No practice of the firm, in relation to their general transactions, could have affected the testimony relative to this particular transaction, one way or the other.' "

To the extent that the testimony of Fogg and Stewart as previously indicated constituted hearsay and self-serving declarations, the objections were obviously well taken and erroneously overruled.

To the extent that these witnesses testified as to matters of internal practices unknown to the insured and appellant, and as to the contents of records uncommunicated to the insured, they were not binding on him nor appellant and should have been excluded.

And to the extent that customary practice of appellee, unknown to the insured or appellant, was relied on for the purpose of showing that Mr. Cobin's policy was no longer in force despite the mailing to him of a notice of prospective premium due, despite the fact that neither witness was able specifically to testify as to particular circumstances under which Mr. Cobin's premium was sent out (R. 353) and that such testimony was based on surmise and

conjecture, it was improperly received for the purpose of nullifying Mr. Cobin's policy.

4. The District Court committed prejudicial and reversible error in its admission into the record, over objection, of evidence in derogation of the attorney client privilege despite assertion of the privilege.

At several stages of the trial, appellee attempted to elicit information which passed between appellant and her former attorneys, Irving I. Emmer and Ralph B. Herzog. The attitude of the trial Judge with respect to such questions reveals that he entertained little regard for attorney client privilege.

Early in the proceedings the following occurred:

> "Q. By Mr. Duque: When Mr. Herzog prepared your Complaint, you did state the facts to him, did you not, as to what had transpired?
>
> "Mr. Horwin: Objected to as calling for privileged communications between the witness and her attorney.
>
> "The Court: I will overrule the objection. She can answer that, as to what she told him, to the best of her knowledge.
>
> "Mr. Horwin: Your Honor, I think I have got to urge this point strongly. This is one of the most clearly privileged territories in the law.
>
> "The Court: But the question is general, just to the best of her knowledge. I thought it was just a general question. She can just answer yes or no.
>
> "Mr. Duque: I am not asking for the conversation. I am asking her whether or not she did tell the attorney the facts.
>
> "Mr. Horwin: It is the same thing.

"Mr. Duque: I am not asking for the facts, what the facts were.

"The Court: I overrule the objection.

"Mr. Horwin: That calls for a broad conclusion, as to whether she told something to an attorney.

"The Court: I will let her answer yes or no and then he can call for conversation." (R. 64).

"Q. By Mr. Duque: Well, when the original Complaint was prepared by Mr. Herzog, your then attorney, and Mr. Emmer, your then attorney, did you or did you not tell them the facts of the transaction and what had occurred, to the best of your knowledge, at that time?

"Mr. Horwin: The same objection, and upon the further grounds that this is an attempt to evade the privileged communication rule by asking the witness to describe the results of her conversation with her then attorney and draw her conclusions as to the content of the conversation which is the same thing as giving the whole privileged communication.

"The Court: No. I will overrule the objection. You can answer it."

Later in the case, Mr. Duque interrogated former attorney, Mr. Emmer, as follows (R. 395-396):

"Q. Mr. Emmer, you were Mrs. Cobin's counsel, were you not, after the death of Mr. Cobin?

"A. Yes.

"Q. All right. Did you have any discussions with Mrs. Cobin about the Midland Mutual policy as relating to the cancellation of the Manhattan policy and the replacement thereof by the Midland policy?

"Mr. Horwin: Objection upon the grounds that any such conversations would be privileged communications by and between the attorney and client.

"Mr. Duque: After all, this gentleman has waived his privilege with regard to Mr. Cobin.

"The Court: I will overrule the objection.

"Mr. Horwin: Just a moment. Your Honor, there is no waiver of the privilege of the plaintiff in this lawsuit by any testimony with regard to events prior to the death of the insured. This would be a parol evidence violation of communication between attorney and client, and it is just the same as if I were to call a representative of the Midland Mutual and ask him to tell me everything he disclosed to Mr. Duque with regard to the facts in this case.

"Mr. Duque: I will withdraw the question and ask a preliminary question, if I may, your Honor.

"The Court: All right.

"Q. By Mr. Duque: Did you have any conversations with Mrs. Cobin relating to the Manhattan Mutual Life insurance policy and the Midland life policy after the death of Mr. Cobin?

"Mr. Horwin: To which I object on the ground that they are communications and are privileged.

"Mr. Duque: I am not asking for a communication, Mr. Horwin. I am asking him only if he had any conversations, and that certainly isn't privileged.

"Mr. Horwin: There is a very clear rule of law that I am aware of, that you are not permitted, by reference to the purported subject matter of conversation, to get around the rule by asking him if such a particular subject matter was discussed.

"It is not relevant here, but in criminal law, the very fact that you would be able to adduce the purpose of conversation and what was discussed just in a statement of a conclusion would defeat the whole purpose of the privilege.

"The Court: I will overrule the objection. You may answer.

"A. There were conversations with regard to both policies."

Subsequently on re-direct examination by Mr. Duque the following occurred (R. 397-398):

"Q. Mr. Emmer, you were counsel for Mrs. Cobin when the complaint was prepared in this action, were you?

"A. In this action?

"Q. Yes.

"A. Yes.

"Q. And I show you the complaint which bears the names 'Ralph B. Herzog & Irving I. Emmer, by Ralph B. Herzog'. Did you have anything to do with the preparation of this complaint?

"A. Yes.

"Mr. Horwin: Just let me have that question.

(Question and answer read by the reporter.)

"Q. By Mr. Duque: And are the facts as set forth in this complaint and verified by Mrs. Cobin the facts which were told to you, as they existed at that time, by Mrs. Cobin?

"Mr. Horwin: Objection on the ground that they are privileged communication between attorney and client, and also on the ground that the instrument itself is the best evidence, being in the record.

"The Court: I will overrule the objection."

It is obvious that appellee was endeavoring by trenching on the attorney-client privilege to cast doubt on the veracity of appellant's amended complaint and to suggest to the Court that Mr. Cobin desired to keep his Manhattan policy in preference to appellee's policy.

In so doing, with the encouragement of the Court, appellee extracted information in violation of the attorney client privilege.

The Court should have sustained the objections to the questions and refused to permit the tendentious line of questioning employed by appellee's counsel.

It needs little citation of authorities to make the point that the privilege of confidential communication between client and attorney is regarded as sacred and that it should not be violated nor whittled away.

> "The attorney-client privilege is an important element in the effectiveness with which the counselor-at-law is to advise his client and safeguard the latter's interest. Where, as here, the right to the privilege is clearly established it should not be cast aside. The fact that the information contained in the communications might also be used for incidental purposes not entitled to the privilege is unimportant."
>
> *Holm* v. *Superior Court,* 42 Cal. 2d 500, 509, 267 P.2d 1025.

5. The District Court committed prejudicial and reversible error in its admission into the record over objection of evidence outside the issues as indicated in the pleadings and otherwise immaterial, incompetent, irrelevant or improper.

In addition to the instances previously cited, the record is encumbered with a welter of evidence which was improperly received, entirely beyond the scope of the issues made by the pleadings. Only a few examples will be given here:

The Court received in evidence over objection:

The planning memorandum for Mr. Cobin put out by a trust company, and admitted conversations relating thereto (Def. Ex. E; R. 89 to 90).

A letter referring to an appointment for a medical examination (R. 106; Def. Ex. E).

A conversation between appellant and Bloome after Mr. Cobin's death (R. 124-125).

The conversation of Mr. Koff and Mr. Cobin occurring a year before the transaction here involved (R. 159-160).

A letter dated December 29, 1954, from Mr. Grosten to Mr. Koff, with regard to why Grosten thought Mr. Cobin should keep his Manhattan policy rather than take appellee's policy (Def. Ex. F; R. 173-176).

Testimony as to what Mr. Grosten did in connection with Mr. Cobin's Manhattan policy (R. 180) and testimony as to whether Mr. Cobin cancelled the Manhattan policy (R. 189).

The significance and prejudicial character of the individual errors appears more clearly when the entire record is studied. But it cannot be doubted that the collective weight of the evidence erroneously and improperly received vitiated the trial and contributed markedly to the decision arrived at below.

III.

The District Court Erred in Its Order of January 7, 1957, Denying Appellant's Motion to File a First Amended Complaint in the Form Lodged on December 18, 1956, and in Requiring the Inclusion of Paragraph 6 in the First Amended Complaint As Filed on February 18, 1957, As a Condition of Granting Permission to File an Amended Complaint.

As appears from the statement of the proceedings before trial (pp. 2-4 of this Brief), the Court refused to permit appellant to file her first amended complaint as lodged (C. T. 10-12). It denied the motion upon appellee's suggestion that he would not object to the filing of an amended complaint if appellant alleged therein a redelivery of the policy to Bloome (R. 4a-7a; R. 8a-17a). Consequently she was obliged to incorporate paragraph 6 into the amended complaint as ultimately filed (C. T. 19).

This is significant as showing the fundamental conceptual error entertained by the Court from the very beginning with respect to the question of re-delivery of the policy to Bloome. As has been demonstrated in the preceding argument, that act would have no signficance, unless, as an offer to cancel, it was accepted by appellee while the offer was still outstanding, and upon notification to Mr. Cobin that the offer was accepted and the policy was cancelled.

This cardinal error permeated the trial court's approach to the case and gave rise to this mistaken view throughout the trial as to the contractual rights existing between the parties.

IV.

The District Court Erred in Its Ruling of February 18, 1957, Denying Appellant's Motion to Strike Certain of Appellee's Proposed Interrogatories to Be Propounded to Harold G. Fogg and Fred E. Stewart and to Limit the Scope of Examination of Such Witnesses, and the Court Committed Prejudicial Error in Admitting into Evidence over Objection Said Interrogatories and the Answers Thereto Which Related to Customs, Practices, Procedures, Interpretations, Markings and Communications of Appellee Company and Its Employees Never Communicated to the Insured nor Known by Him.

This matter has been fully treated in paragraph II, section 3 of the argument set out above, and is incorporated here by reference. It is noted at this point to show that the errors complained of by virtue of the introduction of said interrogatories into the record of this case had their inception from the very threshhold of the proceedings herein.

CONCLUSION.

It is respectfully submitted that a complete study of the record must lead to the conclusion that a miscarriage of justice resulted here. The prevailing principles of law, when applied to the facts of this case, show:

1. That appellee accepted Mr. Cobin's application, issued him a policy, accepted his premium therefor and delivered the policy to him.

2. That at no time while Mr. Cobin was alive did appellee notify him that the policy was cancelled or accept any offer to cancel the policy or return his premium.

3. That no legally effective cancellation of the policy ever occurred in Mr. Cobin's lifetime.

4. That the policy was in full force and effect when Mr. Cobin died on March 5, 1954, and that the insurer's own policy record card showed that the policy did not lapse until March 10, 1954.

5. That his widow is entitled to recover on the complaint herein as beneficiary under said policy.

For the foregoing reasons, it is respectfully requested that this Court reverse the judgment of the trial court and direct the trial court to enter judgment for appellant.

Failing reversal of the judgment, with direction to enter judgment for appellant, the judgment should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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